

The Honorable T.W. Small
Hearing: Friday, January 14, 2005 at 1:30 p.m.

SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

Timothy Borders, et al.,

Petitioners,

VS.

King County, et al.,

Defendants,

No. 05-2-00027-3

RESPONSE OF KING COUNTY AND DEAN LOGAN TO PETITIONERS' MOTION FOR EXPEDITED DISCOVERY

I. INTRODUCTION

Defendants King County and Dean Logan (“King County”) provide the following response to Petitioners’ Motion for Expedited Discovery. Based on the authorities cited and the argument presented herein, King County respectfully requests that Petitioners’ Motion be denied in full and that the Court impose its own reasonable ground rules and limitations on discovery as proposed by King County herein.¹

¹ King County notes that at least one county, Stevens, currently has a pending motion to dismiss for lack of venue. Other Respondent parties, including King County, or Intervenors, may also intend to file dispositive motions. Should such a motion be submitted, King County would not

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II. ARGUMENT

A. This Court Should Impose Reasonable Ground Rules and Limitations on the Expedited Discovery Sought by Petitioners.

Based on the “hope”² that an election contest hearing take place within 20 days of the filing of their petition, and the asserted absence of any prejudice to the Respondents because “[t]hey are well aware of the issues raised in this petition[,]”³ the Petitioners ask this court to vest them with unfettered discretion to conduct discovery on an expedited basis. There is no valid reason to grant the Petitioners’ sweeping request. Instead, the Court should assert its role as the judicial officer assigned to preside over this proceeding and ensure that reasonable ground rules and limitations which are fair to all participants are in place before any discovery is performed.

As a threshold matter, though RCW 29A.68 contemplates that contests be promptly heard and determined, there is nothing in the statute that requires a hearing to take place within 20 days following the filing of an affidavit alleging an error or omission. Rather, RCW 29A.68.040 states that the hearing occurs “on some day to be named by the judge, not less than ten nor more than twenty days from the date of the notice.” (Emphasis added.) There is nothing in this provision that says when the court must issue the notice and thereby trigger the statutory timeline. Thus, Petitioners’ hope that the hearing be conducted on January 27 is a deadline of their own creation.

Second, it is simply incorrect to presume that Respondents will suffer no prejudice by allowing Petitioners’ limitless, expedited discovery. All discovery places a burden on an opposing party. This case is no different, and in some respects much worse. In addition to

object to any request to stay discovery pending its resolution by the Court.

² Petitioners’ Motion, at p. 6, ln 4.

³ Petitioners’ Motion at p. 7, lns 18-19.

1 responding to the interrogatories and requests for production promulgated by the Petitioners, the
2 King County Records, Elections, and Licensing Services Division is simultaneously responding
3 to over 30 pending public disclosure requests related to the November 2, 2004 gubernatorial
4 election. This includes the Petitioners' own comprehensive requests submitted on December 27,
5 2004 (letter from Robert Maguire to Dean Logan), and December 29 and 30, 2004 (letters from
6 Peter Schalestock to Dean Logan). The County has disclosed approximately 20,000 pages of
7 documents so far in response to those requests, and expects to supplement its response with
8 additional documents later this week.⁴

9 In addition to addressing the numerous public disclosure requests, like other counties,
10 King County is currently preparing for a Special Election on February 8, 2005. RCW
11 29A.04.321. Many requirements must be met in preparation for the election. For example,
12 absentee ballots must be inserted in the absentee envelopes and prepared for mailing. The
13 majority of absentee ballots must be mailed next week. RCW 29A.40.070. Legal notice for the
14 Special Election including the ballot titles of all measures, the polling place hours, and polling
15 place locations, is being prepared for publication. RCW 29A.52.351. Required supplies and
16 materials for the polling places must be prepared for delivery to each of the polling places in
17 King County. This includes the proper ballots, precinct lists, voting and registration instructions
18 and information, and other necessary supplies for conducting the election. RCW 29A.44.110.
19 Logic and accuracy testing of the voting systems and equipment must be conducted prior to the
20 election. WAC 434-333-095. The opening and processing of returned absentee envelopes will
21 begin in the ten days prior to the election in preparation for tabulation on election day after the
22

23 ⁴ The provision of supplemental documents assumes that the Petitioners will have paid the
approximately \$4000 bill relating to the initial disclosures previously provided.

1 polls close. RCW 29A.40.110. Then subsequent ballot tabulation will occur in the days
2 following the election and certification must occur on February 18. RCW 29A.60.190.

3 For the reasons stated above, reasonable limitations must be placed on discovery to
4 ensure that county auditors can respond to these requests and make objections, if any, where
5 appropriate. Accordingly, Respondents propose the following nonexclusive list of ground rules
6 and discovery procedures:

7 **1. Depositions**

8 CR 30 provides in relevant part:

9 (a) When Depositions May Be Taken. After the summons and a copy of the
10 complaint are served, or the complaint is filed, whichever shall first occur, any party may
11 take the testimony of any person, including a party, by deposition upon oral examination.
12 Leave of court, granted with or without notice, must be obtained only if the plaintiff
13 seeks to take a deposition prior to the expiration of 30 days after service of the summons
14 and complaint upon any defendant.

15 . . .
16 (b) Notice of Examination: General Requirements . . . (1) A party desiring to take
17 the deposition of any person upon oral examination shall give reasonable notice in
18 writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and
19 court holidays) to every other party to the action and to the deponent, if not a party or a
20 managing agent of a party.

21 In this instance, Petitioners seek “leave of court” to conduct depositions on two days’
22 notice⁵ with no restrictions on the number of depositions they are entitled to set. This request
23 should be denied and/or substantially modified.

First, any notice provided should be given at least three days in advance of the date of the
deposition (exclusive of Saturdays, Sundays and court holidays). This ensures that Respondents
will have at least two working days’ advance notice before the deposition is held. If Petitioners’

⁵ Petitioners’ are vague as to whether they are asking for leave to take depositions on two
calendar days’ notice, or two days’ notice as provided in CR 30—i.e. exclusive of Saturdays,
Sundays and holidays.

1 request is granted, they could give notice on a Monday at 5:00 p.m. for a deposition on
2 Wednesday morning at 8:00 a.m., thus effectively leaving a Respondent with one business day's
3 advance notice and time to prepare.

4 Second, Respondents should have the right to request and, if necessary, have the Court
5 order that a deposition be renoted in the event of a conflict. Though this is a significant case,
6 Respondents should not be penalized for being unable to meet Petitioners' scheduling demands if
7 an honest and reasonable conflict arises and the deposition needs to be rescheduled.

8 Third, at this point depositions should be limited to the named County auditors. On its
9 face, the "leave of court" authorized by CR 30(a) governs requests to take "a deposition," not
10 blank check requests to take all depositions. If Petitioners wish to depose witnesses other than
11 the named County auditors, they should be required to produce (1) a list of those persons to
12 opposing counsel in advance, and (2) a proposed deposition schedule. Opposing counsel should
13 have the opportunity to review the proposed deposition schedule and either agree to it in whole
14 or in part, and request modifications or make objections if appropriate. If the parties are unable
15 to reach agreement despite good faith efforts, then they should submit the matter to the court for
16 resolution by telephonic hearing.

17 Given the amount of informal "discovery" already conducted by Petitioners—at least in
18 King County—they would not be prejudiced by the latter requirement. Petitioners, too, "are well
19 aware of the issues raised" in this case and should have no difficulty complying with such a
20 proposal.

21 **2. Requests for Production**

22 CR 34 provides in relevant part:
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1 (b) . . . The party upon whom the request [for production] is served shall serve a
2 written response within 30 days after the service of the request, except that a defendant
3 may serve a response within 40 days after service of the summons and complaint upon
4 that defendant.

5 In their motion, Petitioners request an order compelling responses to their requests for
6 production of documents and their interrogatories within 10 calendar days of service of such
7 requests. This request should be denied or substantially modified.

8 As previously noted, Petitioners have served a series of public disclosure requests on
9 King County, and presumably on some of the other Respondent counties. To date they have
10 been provided with over 20,000 pages of documents and the County is in the process of
11 supplementing its response to those requests. Several of Petitioners' requests for production
12 appear to overlap with their prior public disclosure requests. If Petitioners are going to demand a
13 condensed timeline to respond to their documents requests, they should be required to request
14 only those documents they have not already asked for and been given access to through public
15 disclosure. In addition, as to any request for production, Respondents should have the
16 opportunity to identify a reasonable response time. If the parties are unable to agree on that
17 response time they should submit the matter to the court for resolution by telephonic hearing

18 **3. Interrogatories**

19 CR 33 provides in relevant part:

20 (a). . . The party upon whom the interrogatories have been served shall serve a copy of
21 the answers, and objections if any, within 30 days after the service of the interrogatories,
22 except what a defendant may serve answers or objections within 40 days after service of
23 the summons and complaint upon that defendant.

24 As with requests for production, Petitioners seek to have the Court compel responses to
25 their interrogatories within 10 calendar days of service of such interrogatories. This request
26 should be denied or substantially modified. At a minimum, each Respondent should have an

1 opportunity to determine whether the condensed response time is reasonable and be permitted a
2 reasonable extension. If counsel are unable to agree on the proposed extension date, they should
3 submit the matter to the Court for a telephonic hearing.

4 **III. CONCLUSION**

5 For the reasons set forth above, Respondent King County respectfully requests that the
6 Petitioners' Motion for Expedited Discovery be denied or substantially modified.

7 DATED this 12th day of January, 2005.

8 Respectfully submitted,

9 NORM MALENG
10 King County Prosecuting Attorney

11 By:_____/S/_____
12 THOMAS W. KUFFEL, WSBA No. 20118
13 Senior Deputy Prosecuting Attorney
Attorneys for Respondent

14 By:_____/S/_____
15 JANINE JOLY, WSBA No.27314
16 Senior Deputy Prosecuting Attorney
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